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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1979

No. 79-727

EUGENE H. RENTSCHLER,
Petitioner,

vs.

DONALD H. FREEMAN, et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the California Court of Appeal,
First Appellate District, Division Four

*Calif Ct App, 1st Dist,
Div 4.*

DANIEL U. SMITH
1050 Northgate Dr., Suite 180
San Rafael, Ca. 94903
Telephone: (415) 472-4441

VERNON L. BRADLEY
1050 Northgate Dr., Suite 180
San Rafael, Ca. 94903
Telephone: (415) 472-4441
Attorneys for Petitioner

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Petitioner prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, First Appellate District, Division Four, entered in the above entitled case on June 11, 1979 (rehearing denied July 10, 1979, hearing denied by the California Supreme Court August 8, 1979).

OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Four, is appended hereto in accordance with United States Supreme Court Rules, Rule 23(1)(i),¹ and was ordered not to be published (reported)

¹All references to court rules are to the rules of the United States Supreme Court, hereinafter, unless otherwise indicated in the body of the text.

by that court. The order denying rehearing, issued by the California Court of Appeal, and the order of the California Supreme Court denying a hearing in the matter were issued as unpublished (unreported) minute orders of the court; they are also appended hereto.

JURISDICTION

The judgment of the California Court of Appeal, First Appellate District, Division Three, was made and entered on June 10, 1979, and a copy thereof is appended to this petition in the Appendix at pages A-1-A-12. The order of the Court of Appeal denying rehearing in this matter was made and entered on July 11, 1979, and a copy thereof is appended to this petition in the Appendix at page B-1. The order of the California Supreme Court denying a hearing in this matter was made and entered on August 8, 1979, and a copy thereof is appended to this petition in the Appendix at page B-2².

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

²Pursuant to Court Rule 22(1) a petition for writ of certiorari is timely when filed within ninety days of rendition of judgment by the highest state court to which an appeal can be taken. In the case at bench, and pursuant to California law, no appeal lies as a matter of right to the California Supreme Court. In these circumstances, the ninety days is computed from the date that the Supreme Court refuses to grant review. See, e.g., *American Ry. Exp. Co. v. Levee*, (1923) 263 U.S. 19, 20-21; *Lone Star Gas Co. v. State of Texas*, (1938) 304 U.S. 224. The procedural and discretionary aspects of the effect of a denial by the California Supreme Court of a petition to consider the effect of a decision of the California Court of Appeal are discussed in *In re Henley* (1970) 9 Cal.App.3d 924.

QUESTION PRESENTED FOR REVIEW

Is a physician entitled to notice of specific charges and a hearing thereon prior to revocation of his hospital staff privileges, absent the presence of any "emergency" conditions, under and by virtue of the due process clause of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment, Section 1, United States Constitution.

2. Title 42, United States Code, Section 1983, which provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. California Health & Safety Code § 32150, effective at the time of the administrative hearings involved in this petition, provided:

"§ 32150. Board's authority as to membership in medical staff, and incidental privileges.

In accordance with reasonable rules and regulations adopted pursuant to Section 32128 of this chapter, the board of directors, after appropriate action by the medical staff, may take action or make a decision:

- (a) Denying an application for membership to the medical staff;
- (b) Revoking membership on the medical staff;
- (c) Denying a request by a member of the medical staff for additional privileges with respect to the practice of medicine or surgery upon a member of the medical staff."

Amended in 1977, the section (§ 32150) now provides:

"Appellate review of action, decision, etc.

§ 32150. Appellate review of action, decision, etc., affecting professional privileges of staff: Finality of decision.

The board of directors shall adopt reasonable rules and regulations, or bylaws, providing for appellate review of any action, decision, or recommendation of the medical staff affecting the professional privileges of any member of, or applicant for membership on, the medical staff. Such appellate review may be conducted by the board or by a hearing officer designated by the board. The board's decision rendered after such appellate review shall be final."

It was the latter amendment upon which the California Court of Appeal relied in affirming the judgment.

STATEMENT OF THE CASE

This action was dismissed at the pleading stage, when the Respondents' demurrer to Petitioner's initial complaint for damages was sustained, and the action therefore ordered dismissed by the San Mateo County Superior Court.

The action arises out of the ex parte suspension of Dr. Rentschler's staff privileges at Sequoia Hospital, a part of Sequoia Hospital District, a public entity operating pur-

suant to the provisions of California's Local Hospital District Act (California Health & Safety Code § 32000 et seq.). The suspension of privileges was the indirect outgrowth of an October 14, 1975 letter from Respondent Freeman to Dr. Rentschler informing Petitioner that any future incidents or unavailability for patient care within the hospital would result in termination of staff privileges. No other notice or hearing was provided in October of 1975, or at any other time prior to suspension of privileges.³

On January 26, 1976, Dr. Rentschler was notified by letter that his privileges were suspended; the letter was signed solely by Dr. Freeman, then President of Sequoia Hospital Medical and Dental Staff. No prior notice or hearing was provided. Dr. Rentschler was invited to a meeting to be held on February 3, 1976, to discuss the matter, and he did attend. The January 26, 1976 letter referred to Rentschler's alleged failure to be available to attend to patient Scott on January 24, 1976.

Dr. Rentschler appeared at the February 3, 1976 meeting of the Executive Committee; claims of impropriety concerning patient Gotfried were aired, and formed the basis of a further 45-day suspension.

To this point, Dr. Rentschler was permitted to continue to care for his patients already admitted to the hospital but was not allowed to admit new patients, to perform consultations, or to care for patients in the hospital emergency room. By a letter dated March 10, 1976, however, Dr. Rentschler's staff privileges were terminated because of an

³An earlier meeting was held also in October of 1975, at which a discussion of availability for patient care was held. The possibility of suspension or limitation of staff privileges was not raised.

alleged incidence of unavailability occurring in September of 1975 (for which no previous charges had been brought), a second alleged incidence of unavailability (the Scott incident) in January of 1976, and a third alleged incident involving a patient not under Dr. Rentschler's care (the Gotfried incident) also occurring in January of 1976. Again, no semblance of notice or hearing was provided. The March 10, 1976 letter was issued from the Executive Committee by Dr. Freeman.

On March 25, 1976, the Board of Directors of the District made yet another announcement of suspension from staff privileges pending any appeal which Dr. Rentschler might take. No notice of hearing, or hearing, was provided.

An appeal was heard by the Judicial Committee on June 25, 1976, and was denied. Dr. Rentschler did appear at this hearing, with counsel. Further appeal, within the hospital administrative procedure, brought Dr. Rentschler before the full Medical and Dental Staff of the hospital on September 13, 1976. The full staff voted then to disapprove the termination of privileges, and to place Dr. Rentschler on probation, the terms of probation to be decided upon by the Board of Directors; a ten-day suspension was levied in order to allow the Board to determine the terms of probation. On September 23, 1976, however, the Board again, without the semblance of any type of notice or hearing, continued indefinitely the suspension of privileges.

Finally, on November 11, 1976, the Board of Directors voted to terminate the suspension, and to place Petitioner upon probation of three years subject to certain conditions, not here relevant. On November 30, 1976, Dr. Rentschler

was reinstated to full staff active membership and privileges, subject to conditions of probation.

Dr. Rentschler desired to continue his attack upon the sanctions, however, and requested a full evidentiary hearing, as provided for in California Health & Safety Code § 32152. Hearings were conducted before a hearing officer, and concluded with the rendition of the hearing officer's report on April 28, 1978. The hearing officer, a former San Mateo County Superior Court Judge, recommended that the period of probation be reduced to eighteen months.

On June 5, 1978, the Board of Directors rendered its "Final Decision" in the matter, ruling that an eighteen-month period of probation was proper, and making other and additional findings than those recommended by the hearing officer.⁴ These additional findings constituted legal conclusions to the effect that the various interim suspensions and the termination of privileges, set forth above, were proper. As the probationary period had begun to commence on November 30, 1976, it had already expired at the time the "Final Decision" was rendered. Thus, the upshot of the "Final Decision" was, as a practical matter, to exonerate Dr. Rentschler from any wrongdoing, and to reinstate him to full staff privileges. Nothing remained for a writ of administrative mandate to annul.

This action was commenced by civil complaint filed in the San Mateo County Superior Court on January 26, 1977. The complaint sought damages caused by the suspensions, and sustained by Dr. Rentschler for defamatory

⁴The hearing officer, although requested to do so, declined to decide whether the interim suspensions and the outright termination of staff privileges was proper.

comments disseminated by Dr. Freeman and other named defendants. The various counts of the complaint alleged causes of action for deprivation of civil rights (42 U.S.C. 1983), defamation, misrepresentation, fraudulent business practices, abuse of process, menace, extortion, and emotional distress.

Defendants Freeman and Meub, the President and President-elect of the Executive Committee respectively demurred to the complaint, as here relevant, upon the basis that Dr. Rentschler had not set aside the "Final Decision" of the Board of Directors by writ of administrative mandate (California Code of Civil Procedure § 1094.5), as assertedly required by the decision of the California Supreme Court in *Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465. The San Mateo County Superior Court sustained the demurrer upon that ground without leave to amend, and Petitioner immediately appealed the subsequent order dismissing his action to the California Court of Appeal, First Appellate District, where it was assigned to Division Four.

On appeal, in his opening brief, Dr. Rentschler contended that he had been deprived of staff privileges without prior notice or hearing, and that he had accordingly stated a valid cause of action pursuant to 42 U.S.C. § 1983, and that a state judicial requirement of a prior administrative mandamus action (first announced by the California Supreme Court in *Westlake Community Hospital v. Superior Court, supra*), could not be superimposed upon the federal statutory scheme. As stated in the opening brief (at pages 24-25):

"It is now well established that a doctor's hospital staff privileges constitute a substantial vested interest, and that such privileges may not be revoked without affording the doctor due process of law. (citation) Denial or revocation of such privileges without due process of law constitutes a violation of rights secured by the Fourteenth Amendment to the United States Constitution. (citation) Thus, it is manifest that Plaintiff's complaint states, or can be amended to state, a cause of action under 42 U.S.C 1983 . . .

An action for violation of civil rights brought pursuant to 42 USC 1983 is governed by federal substantive law. (citations) Thus, although California has concurrent jurisdiction with federal courts for purposes of entertaining a suit brought pursuant to Section 1983 (citations) California procedural requirements which constitute conditions precedent to the maintenance of a damages action may not be invoked to defeat an action brought pursuant to Section 1983. (citation)"

In their opposing briefs, Respondents argued that Dr. Rentschler was barred from suit under 42 U.S.C. § 1983 because the California Supreme Court could devise such a condition precedent. (Respondents' Brief in the California Court of Appeal, pages 26-30). For this proposition Respondents relied upon this Court's decisions in *Imbler v. Pachtman* (1976) 424 U.S. 409, *Wood v. Strickland* (1976) 420 U.S. 308, and *Hortonville District v. Hortonville Ed. Assn.* (1975) 426 U.S. 482. Respondents argued, second, that no cause of action was stated because a doctor is not entitled to due process protection for hospital staff privileges, relying upon this Court's decision in *Board of Regents v. Roth* (1972) 408 U.S. 564. Finally, Respondents

argued that the proceedings were conducted with sufficient safeguards to comply with due process requirements.

In its decision, the California Court of Appeal ruled that Dr. Rentschler received due process, because:

"[California Health & Safety Code] Section 32150 does not require a predetermination hearing."

The Court of Appeal also ruled that Petitioner, accordingly, received all the "process" that was "due" him.

REASONS FOR GRANTING THE WRIT

The question whether a physician is entitled to notice and hearing *prior* to revocation of his hospital staff privileges has never been decided by this Court, and has engendered confusion in and conflicting opinions by those lower courts who have had occasion to be presented with the question. This case, involving neither considerations of emergency nor complications regarding the precise nature of the right held, presents an appropriate vehicle for the Court to settle the question of what "process" is "due" to healing arts practitioners who have had staff privileges peremptorily revoked.

Cases such as *Navato v. Sletten* (8th Cir. 1977), 560 F.2d 340, *Laje v. R. E. Thompson General Hospital* (5th Cir. 1977), 564 F.2d 1159, *Christhilf v. Annapolis Emergency Hospital Ass'n, Inc.* (4th Cir. 1974), 496 F.2d 174, *Woodbury v. McKinnon* (5th Cir. 1974), 447 F.2d 839, *Sosa v. Board of Managers of Val Verde Memorial Hospital* (5th Cir. 1971), 437 F.2d 173, *Shaw v. Hospital Authority of Cobb County* (5th Cir. 1975), 507 F.2d 625, *Duffield v. Charleston Area Medical Center, Inc.* (4th Cir. 1974), 503 F.2d

512, *Duby v. American College of Surgeons* (7th Cir. 1972), 468 F.2d 364, *Meredith v. Allen County War Memorial Hospital Commission* (6th Cir. 1968), 397 F.2d 33, *Birnbaum v. Trussell* (2d Cir. 1966), 371 F.2d 672, *Poe v. Charlotte Memorial Hospital, Inc.* (W.D.N.C. 1974) 374 F. Supp. 1302, and *Milford v. People's Community Hospital Authority* (1968), 308 Mich. 49, either approve in *dictum*, invoke as an alternative holding, or suggest by implication that *prior* notice and hearing is required before a physician's staff privileges may be revoked or restricted in any significant fashion.

The cases enumerated above, however, establish no clear guidelines and provide no consensus whether *prior* notice and hearing are required by the Fourteenth Amendment to the United States Constitution. And there is no dearth of contrary *dictum*, suggestion and implication in other authorities, e.g., *Stretten v. Wadsworth Veterans Hospital* (9th Cir. 1976), 537 F.2d 361, *Klinge v. Lutheran Charities Ass'n of St. Louis* (8th Cir. 1975), 523 F.2d 56, *Peacock v. Board of Regents of University and State Colleges of Arizona* (9th Cir.), 510 F.2d 1324, *cert. den.*, 422 U.S. 1049 (1975), *Jackson v. Fulton-DeKalb Hospital Authority* (N.D. Ga. 1976), 423 F. Supp. 1000, *aff'd* 559 F.2d 1214 (5th Cir. 1977), *Suckle v. Madison General Hospital* (W.D. Wis. 1973), 363 F. Supp. 1196, *aff'd* 499 F.2d 1364 (7th Cir. 1974), *Kaplan v. Carney* (E.D. Mo. 1975), 404 F. Supp. 161, *Citta v. Delaware Valley Hospital* (E.D. Pa. 1970), 313 F. Supp. 301, and see: *Suckle v. Madison General Hospital* (7th Cir. 1974), 499 F.2d 1364.

The fine distinctions drawn in these cases, and the variety of rationales invoked, evidence the absence of any guiding principle which may be utilized to resolve the critical problems which the issue of pre-hearing revocation of hospital privileges engenders. The law in this area is a compost of equivocation and qualifications. Authority may be found for virtually any proposition and any position. Meanwhile, medical societies, hospital administrations, and the physicians themselves are faced with a crazy quilt jurisprudential pattern providing no practical or reliable guidance to them. The case before the Court is but one result and example of the present confusion and conflict.

It is submitted that a useful departure point for traversing this maze may be found in *Mathews v. Eldridge* (1976) 424 U.S. 319, wherein the Court considered the question whether a recipient of Social Security disability benefits was entitled to notice and hearing prior to termination of disability payments. In reaching the conclusion that the recipient is not entitled to *prior* notice and hearing, the Court balanced the private interest involved, in light of the fairness and reliability of the existing predetermination procedures, against the government interest to be served.

In this case, the private interest involved is and was substantial. Dr. Rentschler, prior to the proceedings commenced by the ex parte suspension, enjoyed a reputation as one of the finest physicians and surgeons in the San Francisco Bay Area. As the result of the decision of one person, Respondent Freeman, he in one fell swoop lost that reputation. The interest in staff privileges extends far beyond loss of reputation, however. It strikes at the very basis of Dr. Rentschler's livelihood.

In *Goss v. Lopez* (1975) 419 U.S. 565, this Court held that high school students suspended for misconduct were entitled to some form of notice and hearing *prior* to exclusion from the school for a short period, e.g. ten days. The private interest identified in that opinion as warranting such procedures was the interest of the pupils in maintaining their standing with fellow students and teachers, and possible interference with their future education and employment opportunities. In this case the interest of Dr. Rentschler in his professional standing among his peers and clients, coupled with the demonstrated threat to his future professional opportunities, and present professional obligations, warrants no lesser protections and procedures.

It is difficult to assess the "reliability and fairness" of the predetermination "procedures" which were involved in this case: there were no "procedures" employed. The initial suspension was accomplished by a single individual, acting alone, without the benefit of any form of evidentiary justification for the action taken, and without the benefit of any form of procedural safeguard.

The interest of the government against employing alternative procedures is negligible. There was no "emergency". Dr. Rentschler was permitted to continue to treat his existing patients in the hospital. No claim has ever been made, despite gratuitous and unsupported language appearing in the opinion issued by the California Court of Appeal, that there was any necessity whatever for an immediate termination of privileges.

The questions presented by this case are of great and recurring significance. The serious questions of public policy involved make this case a particularly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DANIEL U. SMITH
VERNON L. BRADLEY
Attorneys for Petitioner

(Appendix Follows)

APPENDIX

Not To Be Published In Official Reports

In the Court of Appeal
of the
State of California

First Appellate District

Division Four

Eugene H. Rentschler,
Plaintiff and Appellant,
vs.
Donald H. Freeman, et al.,
Defendants and Respondents.

1 Civil
No. 44990
(Sup. Ct.
No. 208715)

[Filed June 11, 1979]

In January 1977, Eugene H. Rentschler, a member of the Medical and Dental Staff of Sequoia Hospital District (hereinafter appellant), filed a complaint against Donald H. Freeman and Daniel W. Meub, officers of the Medical and Dental Staff of the Sequoia Hospital District (hereinafter respondents), alleging the following causes of action: intentional misrepresentation; reckless and wanton misrepresentation; intentional interference with contractual relations and defamation; civil conspiracy to defraud and to interfere with contractual relations; unlawful and fraudulent business practices; civil conspiracy to deprive plaintiff of civil rights and to interfere with contractual relations; menace, extortion and intentional infliction of

emotional distress; defamation; abuse of process; and negligent misrepresentation.

Respondents demurred to the complaint on the following grounds: (1) the complaint is defective in failing to allege the filing of a claim against respondents who are entitled to the protection of the California Tort Claims Act, and (2) the complaint is barred by the privileges provided by Civil Code section 47, subdivision 2, and sections 43.7 and 43.8. In a supplemental points and authorities filed on June 12, 1978, a third ground for demurrer was asserted, and (3) appellant must seek a writ of mandate before maintaining a tort action for damages.

The demurrer was sustained without leave to amend on the ground that the court lacked jurisdiction due to appellant's failure to seek a writ of mandate.¹ Judgment of dismissal was entered. The appeal is from the judgment.

Although a demurrer lies only where the defects appear on the face of the pleading (3 Witkin, California Procedure (2d ed. 1971) Pleading, § 797, p. 2410), a complaint may be read to include matters judicially noticed (Code Civ. Proc., § 430.30). In the supplemental points and authorities in support of the demurrer, respondents requested the trial court to take judicial notice of the final decision of the Board of Directors of Sequoia Hospital District. Similarly, appellant requested the trial court to consider the report of the hearing officer which was attached as an exhibit to his points and authorities in opposition to the

¹The court made no ruling on the other two grounds raised in the demurrer. Since the trial court did not err in sustaining the demurrer without leave to amend, it is unnecessary to determine the merits of these two grounds.

demurrer. Both parties request this court to take judicial notice of the fact that Sequoia Hospital District is a public entity, organized pursuant to Health and Safety Code section 32000 et seq.

The reviewing court must take judicial notice of any matter properly noticed by the trial court and may take judicial notice of any matter specified in Evidence Code section 452. (Evid. Code, § 459.) Pursuant to Evidence Code section 452, subdivision (c), "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States" may be judicially noticed.

Although it is uncertain whether the trial court took judicial notice of the matters requested, this court may take judicial notice of the facts as stated in the report of the hearing officer and the final decision of the board of directors for the purpose of determining whether the complaint, if amended, could state facts sufficient to constitute a cause of action.

On October 7, 1975, appellant attended a meeting of the Medical and Dental Staff Executive Committee (hereinafter staff executive committee), during which he was advised that his past conduct toward his patients was unacceptable and inappropriate and that he should arrange to be available to his patients.

On October 16, 1975, appellant received a letter from respondent Freeman notifying him that any future incidents of abandoning patients would result in suspension from the Medical and Dental Staff of Sequoia Hospital.

On January 26, 1976, respondent Freeman suspended appellant for an indefinite period from admitting patients to the hospital and requested appellant attend a staff executive committee meeting on February 3, 1976.

On February 3, appellant attended the meeting of the staff executive committee which affirmed appellant's suspension.

On February 10, appellant was notified by respondent Freeman that his hospital privileges were restricted for 45 days from January 26, 1976. He was prevented from admitting patients to the hospital, performing consultations, or caring for patients in the emergency room. He was further asked to resign.

On March 10, appellant was notified that the staff executive committee voted to terminate his staff membership. Appellant was also informed of his right to appeal.

On March 17, appellant advised the staff executive committee of his intention to appeal the decision.

On March 25, the Board of Directors of Sequoia Hospital District voted to suspend appellant from the staff while he was pursuing his appeal.

On June 22, appellant and his attorney attended a meeting of the Medical and Dental Judicial Committee during which the committee voted to sustain the action of the staff executive committee.

Appellant then requested a hearing before the full Medical and Dental Staff.

On September 13, a hearing, attended by appellant and his attorney, was held before the entire staff. The staff

voted (1) to disapprove the action of the staff executive committee terminating appellant's staff privileges, (2) to continue appellant's suspension from the staff for an additional period of 10 days, and (3) to place appellant on probation for up to two years.

On September 23, the Board of Directors of Sequoia Hospital voted to continue the suspension of appellant.

On November 11, the board of directors voted to terminate appellant's suspension upon the condition that appellant accept probation for a period of three years.

On November 30, appellant was reinstated to active staff membership subject to the conditions of probation.

Appellant then filed an application for hearing.

The matter was assigned to a hearing officer on March 24, 1977. Hearings were held in October and November 1977, and January 1978. The hearing officer issued an advisory report finding that appellant had failed to comply with the community standards of medical practice and that the board of directors acted lawfully in placing appellant on probation. The hearing officer recommended, however, that the period of probation be reduced from three years to 18 months.

On June 5, 1978, the board of directors issued its final decision which adopted all of the recommendations of the hearing officer. The board of directors further found that appellant's staff privileges were properly suspended on January 26, 1976, and the suspension was properly continued to November 30, 1976.

I

Respondents contend that appellant is required to set aside the board of directors' decision in a mandamus proceeding before instituting a tort action for damages. We agree.

It has been recently established that a nonprofit hospital, whether private or public, must reasonably exercise its power to pass on an application for appointment to or renewal of staff membership. (*Ascherman v. San Francisco Medical Society* (1974) 39 Cal.App.3d 623, 631.) Additionally, the hospital may not infringe upon a physician's staff privileges without granting him minimal due process. (*Id.*, at p. 648.) Consequently, the physician must be given notice of the charges against him with sufficient time to adequately prepare a defense. (*Id.*) A hearing by the decision makers must be held and only evidence produced at the hearing may be the basis of the decision. (*Id.*)

If a physician is deprived of staff privileges without the benefit of basic procedural protection, the physician may file an immediate tort action for damages. (*Willis v. Santa Ana Etc. Hospital Assn.* (1962) 58 Cal.2d 806, cited with approval in *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 478.)

However, if the hospital makes a determination by a quasi-judicial proceeding to deny a physician his staff privileges, the aggrieved physician must successfully set aside the decision in a mandamus action before instituting a tort action for damages. (*Westlake Community Hosp. v. Superior Court, supra*, 17 Cal.3d 465 at p. 469.) So long as such a quasi-judicial decision has not been set aside

through appropriate review procedures the decision has the effect of establishing the propriety of the hospital's action. (*Id.*, at p. 484.)

Appellant contends that if he were required to seek a successful mandamus action it would be an exercise in futility, as the final decision of the board of directors did not impose any suspension, limitation, revocation or restriction. In effect, he claims there would be no action to mandate.

Appellant is correct that a writ of mandate will not issue unless it is necessary to protect a substantial right and upon a showing that substantial damage will be suffered by the petitioner if the writ is denied. (*Grant v. Board of Medical Examiners* (1965) 232 Cal.App.2d 820.) In the present case, however, the board of directors in its final decision specifically approved the actions of the hospital staff, concluded that the suspension of appellant pending final decision was proper and that appellant's conduct constituted a valid and lawful basis for discipline or corrective action. The board also placed appellant on probation subject to certain specified conditions for 18 months. If the board's conclusions were improper, mandate would clearly lie to remove these charges from the record.

We also note that on September 2, 1978, appellant filed a petition for writ of mandate in which he asked that the court command respondent to set aside its decision imposing probation and that the court decree that the penalties and limitations imposed on appellant were improper. Apparently appellant concedes by seeking the writ that substantial rights are involved.

Appellant contends, citing *Westlake Community Hosp. v. Superior Court*, *supra*, the above-stated rules requiring exhaustion of remedies and a successful mandamus action before instituting a tort action are inapplicable to him. He asserts that he is entitled to an immediate tort action for damages because he was suspended without the benefit of any notice or hearing from January 26, 1976, when he received his first letter from respondent Freeman, until November 30, 1976, when the board of directors reinstated him.

Appellant's asserted denial of minimum due process protection is not supported by *Westlake Community Hosp. v. Superior Court*, *supra*, as he contends. In *Westlake*, plaintiff-physician's application for membership at Los Robles Hospital was denied without notice of the charges against her, and without an opportunity for a hearing. Although plaintiff-physician was required to exhaust hospital remedies, she was never notified of her right to appeal the decision of rejection. Thus, the court concluded, she was entitled to immediate tort action for damages.

In so holding, the court relied upon *Willis v. Santa Ana Etc. Hospital Assn.*, *supra*, 58 Cal.2d 806, wherein the osteopathic physician's membership on the hospital staff was terminated without any reason or hearing. The court allowed suit for damages without requiring a prior mandamus action.

In the present case, appellant was clearly put on notice of the charges and the potential action to be taken against him. Appellant was advised on October 7, 1975, at a meeting of the staff executive committee which he attended,

that his past conduct toward his patients was unacceptable and inappropriate. On October 16, 1975, appellant was notified that if he continued abandoning his patients, he would be suspended from the staff.

On January 26, 1976, when appellant was actually suspended, he was requested to attend a meeting of the staff executive committee on February 3, 1976. It was at this meeting that appellant had the opportunity to state his defense. Furthermore, throughout the 10-month period appellant was suspended, he attended several meetings during which the merits of his suspension were discussed.

Unlike *Westlake* or *Willis*, where the action taken was completely in derogation of the aggrieved physician's rights, the case before us demonstrates appellant received notice and had sufficient opportunity to be heard before and during the period of suspension.

Appellant, under these circumstances, has no right to an immediate suit in tort for damages.

II

Appellant asserts the court in *Westlake* left unanswered the question of the proper procedure to be followed when a tort action has been filed prior to a successful mandamus proceeding. Appellant contends the trial court should have ordered his tort action continued rather than dismissed.

The court in *Westlake* did confront the question. With a similar fact situation, the court found that plaintiff-physician's tort action was premature as to Westlake Hospital. Thus, rather than continue the action until a successful resolution of the mandamus proceeding, the court held

that defendant Westlake Hospital's motion for summary judgment should have been granted.

Code of Civil Procedure section 312 provides: "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

Until appellant successfully sets aside the board of directors' decision validating the staff executive committee's action of suspension, respondents are free from liability. Thus, at the time appellant filed his tort action for damages, no cause of action had accrued against respondents. "It is a settled rule of our law that the plaintiff's right of action must exist when he commences his action. [Citations.] The plea that an action is prematurely brought is a perfect defense to the merits. [Citation.]" (Gardner v. Shreve (1949) 89 Cal.App.2d 804, 810.)

There are cases in which a continuance instead of dismissal of a prematurely filed action has been permitted. In these cases, however, the cause of action was certain to accrue within a short time. In the present case there is no certainty that appellant will prevail on his petition for writ of mandate. The trial court properly granted the demurrer without leave to amend.

III

Appellant contends that his complaint can be amended to state a cause of action under 42 United States Code section 1983. Under the Civil Rights Act "[e]very person who, under color of any statute, ordinance, regulation, cus-

tom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The determinative issue is whether appellant has been deprived of a constitutional right. Appellant does not claim a constitutional right to hospital staff privileges but contends that the denial of his hospital staff privileges without the benefit of due process protection constitutes a violation of his Fourteenth Amendment rights.

Health and Safety Code section 32150, which governs the hearing procedures for members of a county hospital medical staff provides that: "The board of directors shall adopt reasonable rules and regulations, or bylaws, providing for appellate review of any action, decision, or recommendation of the medical staff affecting the professional privileges of any member of, or applicant for membership on, the medical staff. Such appellate review may be conducted by the board or by a hearing officer designated by the board. The board's decision rendered after such appellate review shall be final."

Appellant was twice warned that his conduct was unacceptable and inappropriate before any action was taken against him. At the time appellant was suspended he was notified to attend a staff meeting to hear his case. The brief suspension prior to hearing was required for the protection of appellant's patients.

Section 32150 does not require a predetermination hearing. It provides an aggrieved physician with appellate review of any action or decision by the medical staff which affects the physician's professional privileges.

Appellant was provided with an extensive appellate review by the hearing officer after the board of directors voted to reinstate appellant on a probationary basis. After full consideration of the hearing officer's report, the board of directors adopted all of the recommendations contained therein and also found that the staff executive committee's action to suspend appellant was proper.

On these facts alone, appellant was not denied his rights guaranteed by section 32150. In fact, appellant was given more procedural due process protection than required by law. He received notice of the charges against him well before any action was taken. Furthermore, he and his attorney attended several meetings during which the merits of his suspension were discussed. Under these circumstances, it is difficult to comprehend how appellant can seriously allege he was deprived of his right to due process.

The judgment is affirmed.

Caldecott, P. J.

We concur:

Christian, J.

Delucchi, J.*

*Assigned by the Chairperson of the Judicial Council.
Rentschler v. Freeman—1 Civil 44990

Court of Appeal of the State of California

in and for the

First Appellate District

Division Four

Eugene H. Rentschler,
Plaintiff and Appellant,
vs.
Donald H. Freeman, et al.,
Defendants and Respondents.

No. 44990
Superior Court
No.

[Filed July 10, 1979]

BY THE COURT:

The petition for rehearing filed in the above entitled cause is hereby denied.

Dated July 10, 1979

Caldecott, P.J.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

August 8, 1979

I have this day filed Order

HEARING DENIED

In re: 1 Civ. No. 44990

Rentschler

vs.

Freeman

Respectfully,

G. E. Bishel

Clerk